WC 04-172

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
SBC Communications Inc.	)	
	)	
	)	WC Docket No. _____
Emergency Petition for Declaratory Ruling, Preemption, and For Standstill Order To Preserve the Viability of Commercial Negotiations	)	

EMERGENCY PETITION FOR DECLARATORY RULING, PREEMPTION AND FOR STANDSTILL ORDER TO PRESERVE THE VIABILITY OF COMMERCIAL NEGOTIATIONS

SBC Communications Inc. ("SBC"), on behalf of itself and its local exchange carrier affiliates, respectfully files this emergency petition for immediate Commission action to restore the viability of voluntary commercial negotiations for wholesale products and services. The Commission itself has unanimously recognized that commercial agreements are "needed now more than ever" and that such agreements are in the "best interests of America's telephone consumers[.]"[1] Nevertheless, the prospect of state regulation of such arrangements under section 252 of the Telecommunications Act of 1996 ("1996 Act") or state law threatens to derail the very process the Commission has endorsed. To ensure an environment that is conducive to voluntary negotiations, the Commission should immediately clarify that section 252 does not apply to private commercial arrangements for the provision of products or services outside the scope of sections 251(b) and (c) (hereinafter "non-251 arrangements"), and should preempt any state

[1] Letter from Chairman Michael K. Powell, *et al.*, FCC, to Edward Whitacre, SBC Communications, at 1 (Mar 31, 2004) ("March 31 Letter"). This letter was sent after the D C. Circuit released its opinion in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D C. Cir. 2004) invalidating certain portions of the Commission's *Triennial Review Order*, including the provisions addressing the unbundling of mass market switching.

requirements that such arrangements be filed with and approved by state commissions. Finally, because at least one state has already ordered SBC and Sage Telecom, Inc. ("Sage") to file all of the terms of their recently voluntarily negotiated private commercial agreement, including the provisions for non-251 arrangements, and other states have indicated that they may soon follow suit, the Commission should address this petition on an emergency basis and should immediately issue a stand-still order enjoining the enforcement of any filing or approval requirement while this petition is pending.

On March 31, 2004, the Commissioners declared their unanimous judgment that the interests of consumers will best be served by incumbent carriers and CLECs engaging in good-faith negotiations to arrive at commercially acceptable arrangements that would provide a substitute for unbundled network elements. The Commissioners urged SBC, Sage and other carriers to use "all means at their disposal" to "maximize" the success of such efforts.[2] SBC and Sage firmly endorse the Commission's judgment. Even before receiving the Commission's letter, SBC had initiated negotiations with a number of CLECs in an attempt to reach such commercial agreements. And, as the Commission is aware, SBC and Sage have now reached a private commercial agreement for, *inter alia,* a market-based substitute for the UNE-P. SBC is actively negotiating with other CLECs as well, and it hopes to reach additional agreements consistent with the Commission's goals.

Under the SBC/Sage agreement, which has not yet become effective, SBC will provide Sage with a range of wholesale products and services for a period of years. Some of these products and services clearly relate to the implementation of section 251 obligations, such as provisions addressing section 251(b)(5) reciprocal compensation and provisions setting forth the price, terms, and conditions of POTs loops the Commission has determined SBC must unbundle pursuant to section 251(c)(3). Others relate to items that are not required under section 251. These other items, including but not limited to provisions establishing a replacement for the

[2] *Id.*

UNE-P, were not negotiated under the auspices of section 251, nor did they purport to implement any ongoing section 251 obligation. Rather, they were negotiated on a strictly *voluntary and commercial* basis – the very type of arrangement this Commission has expressly sought to encourage.

Like any private commercial arrangement negotiated on an arm's length basis, the SBC/Sage agreement reflects a series of trade-offs. SBC made concessions, and so did Sage. Terms that, in and of themselves, may not have been acceptable to one of the parties were deemed acceptable because of some other term(s) of the agreement. Indeed, since the agreement is a *region-wide* agreement and not a state-specific agreement, tradeoffs were made, not only among different provisions, but among different states. Thus, terms that SBC or Sage may not have accepted in some states were deemed acceptable when applied uniformly across the entire SBC region.

In addition, as with many private commercial agreements that are specifically tailored to address the business needs of the negotiating parties, the SBC/Sage agreement contains confidential information about the business plans of the parties – in particular, information about Sage's future business plans. No business would deem disclosure of such information to its competitors acceptable, and Sage is no exception. Accordingly, the agreement specifically requires both parties to use their best efforts to maintain the confidentiality of the terms of the agreement.

Both SBC and Sage recognize that those terms of their agreement that pertain to obligations under section 251 of the Act must be filed. Accordingly, they plan to file all provisions of the agreement that address the rates, terms, and conditions under which the parties purport to meet their obligations under section 251, including provisions relating to reciprocal compensation and unbundled access to POTS loops. SBC further recognizes that to the extent a commercially negotiated agreement includes terms for de-listed UNEs that are functionally the

same as existing tariffed services (*i e*, unbundled dedicated transport or high capacity loops, which are functionally the same as special access services), those terms should be tariffed.[3] The Act does not require, however, that SBC or Sage file other *non-251 arrangements* in their agreement with the state commissions. Any such requirement would be an *expansion* of the scope of section 252, an expansion that is not only without legal foundation, but contrary to the very concept of voluntary commercial negotiations.

On April 28, 2004, however, the Michigan Public Service Commission—without notice or an opportunity for hearing, and apparently pre-judging that the private commercial agreement between SBC and Sage is an "interconnection agreement" under section 252—issued an order that "the SBC/Sage agreement must be formally filed with the [Michigan PSC] for its consideration."[4] The Michigan PSC indicated it would review the SBC/Sage agreement "to determine whether the agreement discriminates against other competitors and is in the public interest."[5]

It also appears that other states may soon follow Michigan's lead. SBC has received letters from the staff of the Kansas Corporation Commission[6] and the general counsel of the California Public Utilities Commission[7] indicating their belief that SBC and Sage should file

---

[3]The SBC/Sage agreement does not contain any such terms.

[4] In the Matter, on the Commission's Own Motion, to Require SBC Communications, Inc., and Sage Telecom, Inc. to Submit Their Recently Negotiated Agreement for the Provision of Telecommunications Services in Michigan for Review and Approval, Case No. U-14121, Order (Apr. 28, 2004) ("Michigan PSC Order") (Attachment A). The reach of the Michigan PSC Order is sweepingly broad. It requires disclosure not only of agreements as to resale, interconnection, and unbundled network elements, *i.e.*, section 251 obligations, but also "any and all agreements between SBC and Sage (including their affiliates) that have not been publicly filed with [the Michigan PSC] and that address, in whole or in part, terms, conditions, or pricing in Michigan for . . port or loop components of SBC's network."

[5] *Id.*

[6] Letter to Cyndi Gallagher, Director – Kansas Regulatory, from, Don Low, Director, Utilities Division – Kansas Corporation Commission, dated April 28, 2004, re: SBC/Sage Agreement (Attachment B).

[7] Letter to Cynthia Marshall, Vice-President, Regulatory SBC, from Randolph L. Wu, General Counsel, State of California Public Utilities Commission, dated April 21, 2004, re: Interconnection Agreement Between SBC and Sage Telecom, Inc. (Attachment C).

their non-251 arrangements. Last Thursday, MCI, AT&T and other CLECs filed a motion requesting that the Texas Public Utility Commission order SBC and Sage to file their agreement.[8] And all of these actions follow on the heels of an April 8, 2004, letter from NARUC "reminding" SBC and Sage that their agreement must be filed with state commissions.[9]

The Commission cannot let these actions derail the private commercial negotiation process it has unanimously endorsed. After eight years of litigation and three remands, SBC and undoubtedly many CLECs would like nothing more than to bring certainty to their businesses and to establish wholesale arrangements that make business sense for all concerned. In order to achieve that goal, regulators must stand aside and let businesses take a stab at doing what regulators themselves have struggled to do for eight years: establish a workable and sustainable wholesale framework. If negotiations are tainted by regulatory overhang, if a private commercial agreement is subject to approval or modification by regulators, if the terms of that agreement can be picked apart in negotiations as a result of the "pick-and-choose" rule, no carrier – ILEC or CLEC – will have much of an incentive to negotiate. Instead, ILECs and CLECs will resume their positions at the litigation table. That is why one analyst has written that state review would "dampen, if not shut down, the negotiation process," and, noting specifically the Michigan decision and the California letter, described commercial negotiations as "in danger of a train wreck."[10]

---

[8] Joint CLEC Petition for A Ruling Relative to the Need for Public Review and Approval by the Commission of the April 3, 2004 Telecommunications Services Agreement Between SBC-Texas and Sage Telecom, *Joint CLEC Petition for Expedited Ruing Regarding the Filing of the SBC/Sage Agreement*, Docket No. __, (April 28, 2004)("TX CLEC Motion").

[9] Letter to Dennis Houlihan, CEO Sage Telecom, Inc. and Edward E. Whitacre, Jr., Chairman and CEO of SBC Communications, Inc., from, Stan Wise, NARUC President and Robert Nelson, Chair, NARUC Committee on Telecommunications, dated April 8, 2004, re: The Recent Announcement of a Negotiated Interconnection Agreement between SBC Communications, Inc. and Sage Telecom, Inc. (Attachment D).

[10] *Telecom Regulatory Note – Triennial negotiations –headed to a train-wreck?* Regulatory Source Associates, LLC, Anna-Maria Kovacs and Kristin L. Burns (Apr. 29, 2004)("Train Wreck").

The Commission can prevent this "train wreck" by prompt action on this petition. Specifically, it should take three actions:

- *First*, the Commission should make clear—by issuing an immediate declaratory ruling—that an agreement or portion thereof that does not purport to implement any of the requirements of section 251 is not subject to the requirements of section 252, including the filing requirements of section 252(e)(1) and the MFN provisions of section 252(i).
- *Second,* the Commission should preempt states from requiring the filing and approval of non-251 arrangements under the auspices of state law.
- *Third,* the Commission should issue a standstill order enjoining the enforcement of the Michigan PSC Order and any other state filing requirement for non-251 arrangements pending a final decision on this petition.

I. THE COMMISSION SHOULD DECLARE THAT NON-251 ARRANGEMENTS ARE NOT SUBJECT TO THE REQUIREMENTS OF SECTION 252 AND IT SHOULD PREEMPT STATE LAW TO THE EXTENT SUCH LAW IS INVOKED TO REQUIRE THE FILING AND APPROVAL OF SUCH ARRANGEMENTS.

To eliminate the current roadblock to commercial negotiations thrown up by the Michigan PSC Order and the prospect of similar requirements in other states, the Commission should declare that section 252's requirements, including the filing of agreements for state review and approval and the MFN requirements of section 252(i), do not apply to non-251 arrangements.[11] Such a ruling would comport, not only with the plain language of section 252

[11] Although the Michigan PSC does not rely in its order on section 271, some parties have suggested that states have authority under section 271 to review non-251 arrangements, including commercial arrangements for a UNE-P substitute negotiated after the elimination of any section 251 requirement to provide UNE-P. *See, e g*, PACE Coalition, *The Continuing Path to Local Competition· The Importance of Section 252 to Achieving Just and Reasonable Terms, Conditions, an Prices for UNE-P,* available at

itself, but also with the overall purposes of the Act. The Commission should exercise its authority to declare that this conclusion is controlling as a matter of federal law and is binding on state commissions.[12] It also should preempt states from invoking state law to the same end.

a. The Language of the Act Does Not Require the Application of Section 252 to Non-251 Arrangements

The scope of the section 252 filing requirement is addressed in section 252(a)(1) – the provision that establishes that requirement. That provision contains limits on the types of agreements to which it applies. Specifically, section 252(a) states that, "upon receiving a request for interconnection, services or network elements pursuant to section 251," an ILEC "may negotiate and enter into a binding agreement with the requesting telecommunications carrier without regard to the standards set forth in subsections (b) and (c) of section 251."[13] It then

---

http://www pacecoalition.org/Section_252_and_Local_Competition.pdf. That is simply wrong as a matter of law. As an initial matter, section 271 does not require the provision of UNE-P, because it does not import the combination requirement of section 251. Thus, even if provisions implementing section 271 had to be filed with the states (which they do not), commercial arrangements for UNE-P substitutes would not be covered by any such filing requirement. In any event, the CLECs are incorrect that terms implementing section 271 requirements must be submitted to the state commissions for review and approval. The states have no statutory role in delineating the requirements of the competitive checklist. Providing such a role through the back door by requiring that agreements implementing the competitive checklist be submitted to state commissions for their review and approval would violate basic conflict preemption principles. The requirements of section 271 are purely federal requirements, imposed under the terms of a federal statute that is administered solely by the Commission. And any mechanism that would allow the states to regulate any of the rates, terms, or conditions of items required under section 271—such as a requirement that agreements for the provision of checklist items be submitted for state review—would violate that role assigned by Congress to the Commission. Thus, in the *Triennial Review Order*, the Commission clear that *it* will enforce the requirements of the competitive checklist, "in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket No. 01-338, 18 FCC Rcd 16978, FCC 03-326 ¶ 664 (Aug. 21, 2003).

[12] *See generally Chevron U S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *AT&T Corp v Iowa Utilities Bd*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd v FCC*, 219 F.3d 744 (8th Cir 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications, Inc v. FCC*, 535 U.S. 467 (2002).

[13] 47 U.S.C. § 252(a)(1).

provides that any such agreement "shall be submitted to the State commission."[14] Accordingly, based on the language of section 252(a) itself, the only agreement that must be filed with a state commission is one that is triggered by "*a CLEC request for interconnection, services or network elements pursuant to section 251.*"[15]

There is more than one possible interpretation of this limiting language. The most aggressive interpretation – one that comports most literally with the language of the statute itself – would be that if a CLEC does not request a negotiation for interconnection, services, or network elements pursuant to section 251 – any resulting agreement is not subject to section 252 requirements. Under that reading of the statute, the SBC/Sage agreement would not have to be filed because the agreement expressly provides that it was not triggered by a request for interconnection, services, or network elements pursuant to section 251.

A more conservative reading of the statute is that, to the extent an agreement purports to address the rates, terms, and conditions under which the parties will fulfill their obligations to provide interconnection, services, or network elements under section 251, those provisions must be filed. Conversely, to the extent a commercial arrangement relates to products or services *not* clearly covered by and thus does not purport to implement section 251, section 252(a)(1) does not require that it be filed with a state commission.[16]

Importantly, that conclusion would not mean that, as to facilities and services that must be offered under section 251, filing and review is not necessary simply because the parties have decided not to follow federal-law obligations (for example, TELRIC pricing) in a particular

---

[14] *Id.*

[15] *Id.* (Emphasis added.)

[16] Although section 252(a)(1) requires the filing of "agreements," not various terms of agreements, any analysis of the section 252(a)(1) filing requirement ultimately must rest on the terms that must be filed. It cannot be the case that the scope of the filing requirement hinges not on the substance of the provision at issue, but on its packaging. If that were the rule, parties would simply segregate all non-251 terms of their agreements and place them in separate agreements. To rule, therefore, that a term that would otherwise not have to be filed becomes subject to section 252(a) if it is packaged in the same agreement with terms that do have to be filed would exalt form over substance.

instance. Section 252(a)(1) contemplates that, as to such facilities, services, or interconnection, the parties may negotiate "without regard to the *standards* set forth in subsections (b) and (c) of section 251," but that does not change the fact that these are services or network elements being offered "pursuant to section 251." Accordingly, *all* of the rates, terms, or conditions under which the parties agree to provide interconnection, services, or network elements pursuant to subsections (b) or (c)—including those rates, terms, or conditions that deviate from the required *standards* for meeting those obligations—must be filed. However, requiring the filing and review of terms that deviate from the "standards" set forth in subsections (b) and (c) is not the same thing as requiring the filing and review of terms for products and services that fall outside the scope of subsections (b) and (c) altogether. The former must be filed; the latter need not be.

That section 252(a) requires the filing only of those rates, terms, and conditions under which the parties address their section 251(b) and (c) obligations is buttressed by section 251(c)(1) of the Act. That section provides that ILECs must negotiate under section 252 "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection." To the extent that a particular element need no longer be unbundled under 251(d)(2), it falls outside the scope of the ILEC's duty to negotiate under section 251(c)(1). It is reasonable to conclude that an agreement that results from such negotiations is likewise outside the scope of the section 252 filing and review requirement.[17]

---

[17] The fact that the D.C. Circuit's mandate has been stayed does not alter the application of this conclusion to the UNE-P substitute agreed to by Sage and SBC. First, the SBC/Sage agreement will not take effect until July 1, which is after the deadline for the mandate to issue. Although a further stay is possible, the parties had to negotiate based on the information currently available, and their choice of a July 1 effective date is objective evidence that the agreement is not intended to take effect until after the mandate has issued. Second, the Sage agreement was negotiated at a time of considerable uncertainty about what SBC's section 251 obligations would be and whether (and when) some of those obligations would be lifted as a result of the D.C. Circuit's decision. Thus, the SBC/Sage negotiation is not properly characterized as a negotiation "in response to a request for interconnection, services, or network elements pursuant to section 251 " To the contrary, this was a negotiation the express purpose of which was to find mutually acceptable *business* terms outside the context of any regulatory requirement. In this regard, the parties agreed to a UNE-P substitute against a backdrop in which both parties recognized that the UNE-P requirement had been vacated and thus could be altered significantly, if not eliminated altogether. Neither party knew what the ultimate rules would be, and both sought business certainty at a time of

Interpreting section 252(a)(1) in this manner is also consistent with the core purposes of the 1996 Act. Sections 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition. It would make sense, therefore, that Congress would insist that the terms under which carriers endeavor to meet these requirements are met be reviewed by state commissions and. Conversely, there would appear to be no reason why Congress would subject arrangements for other services and facilities to the same scrutiny. Since Congress did not deem such arrangements important enough to require in the first place, it would be odd to construe the Act as requiring state approval of the terms on which carrier purport to provide such arrangements.

This reading also gives substance to the most favored nation MFN provisions in section 252(i). Section 252(i) does not require that *all* of the terms of an interconnection agreement be made available. Rather, it requires only that incumbent LECs "make available any interconnection, service, or network element provided under an agreement approved under this section ... upon the same terms and conditions as those provided in the agreement." By filing the rates, terms, or conditions under that the parties negotiate to meet their obligation to provide interconnection, services, or network elements required by section 251 — even if those rates, terms, or conditions deviate from the required standards of subsections (b) and (c) — an ILEC will be ensuring that all CLECs are able to exercise their MFN rights. Section 252(i) requires no more.

---

considerable regulatory uncertainty. That is why the SBC/Sage agreement contains no change of law provision. It is also why the very first "whereas" clause of the SBC/Sage agreement states: "Whereas, both [parties] have been and continue to be subject to significant regulatory and business uncertainties and risks due, in part, to the continuous and laborious cycle of regulatory orders and order-vacating appeals, as has been illustrated with regard to unbundling obligations of ILECs as defined in recent FCC orders under 47 U.S.C. § 251(d)(2), and in the recent decision in *USTA v. FCC,* No. 00-1012 (U.S. D.C. App. March 2, 2004) " The fact of the matter is that the SBC/Sage negotiation that resulted in the UNE-P replacement could in no way be characterized as a negotiation under the auspices of section 251(c).

Finally, this result is also consistent with the Commission's *Qwest ICA Order*.[18] In that order, the Commission determined that BOCs have an obligation to file with state commissions all contracts that "create[] an ongoing obligation *pertaining to* resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, unbundled network elements, or collocation," *i.e.,* the requirements of sections 251(b) and (c).[19] At the same time, the Commission made clear that its order does not require the filing of "all agreements between an incumbent LEC and a requesting carrier."[20] Moreover, the Commission specifically premised this conclusion on its holding that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[21]

Thus, for example, the Commission determined that dispute resolution and escalation clauses "relating to the obligations set forth in sections 251(b) and (c)" must be filed, because "the means of" resolving and escalating such disputes effectuate the Act's requirement of providing the items required by sections 251(b) and (c) on a non-discriminatory basis.[22] Similarly, in its subsequent *Notice of Apparent Liability for Forfeiture* (*"NAL"*) against Qwest, the Commission specifically mentioned Qwest's failure to file agreements concerning specific section 251(b) and (c) obligations, as well as administrative and procedural provisions pertaining to those obligations, as violating section 252's requirements as interpreted by the Commission in its *Qwest ICA Order*.[23] These decisions are fully consistent with the conclusion that section 252

---

[18] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337, FCC 02-276 (2002)("Qwest ICA Order").

[19] *Qwest ICA Order* ¶ 8.

[20] *Id* n 26

[21] *Id*

[22] *Id.* ¶ 9.

[23] Qwest Corporation Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, 19 FCC Rcd 5169 at ¶ 26 n. 81, 83 (2004).

requires filing with a state commission only those arrangements that are themselves required under sections 251(b) or (c).

The Commission's own precedent thus fully supports the conclusion that the language of the Act does not require the filing of non-251 arrangements for review by state commissions and does not require the application of section 252(i) to such arrangements. In order to remove any uncertainty on this issue, however, the Commission should declare, in no uncertain terms, that the Act does not impose such requirements.

a. Requiring That Non-251 Arrangements Be Subject to Section 252 Would Frustrate the Market-Based Goals of the Act and the Commission's Call for Commercial Negotiations

The conclusion that non-251 arrangements of private commercial agreements are not subject to section 252 is not only consistent with the language of the 1996 Act; it also fully comports with the underlying goals of the Act. In particular, requiring the filing of such terms for state review would frustrate the market-based goals of the 1996 Act generally, as well as the specific call by all of the Commissioners for negotiations as to commercially acceptable arrangements between ILECs and CLECs.

If commercial negotiations are to fulfill their potential, they must address the particular business needs and plans of the parties. To the extent they address those needs, however, they are likely to contain competitively sensitive business information. They might, for example, reveal information about service features a CLEC plans to offer or other business strategies, such as the type of customers on which the CLEC will focus. This is precisely the type of information a carrier would not ordinarily reveal to its competitors. Requiring that commercially negotiated agreements be filed in their entirety thus presents negotiating parties with a Hobson's choice: either they scrupulously avoid terms that might reveal proprietary business information – in which case the negotiations are less likely to satisfy their business needs – or they risk disclosing competitively sensitive information to their competitors. That is not a choice that is likely to result in fruitful, productive negotiations; to the contrary, it is a choice that will most certainly

impede such negotiations. More immediately, the requirement imposed by the Michigan PSC threatens to harm Sage by revealing its competitively sensitive strategies and business plans to its competitors. Sage Telecom's President and CEO has publicly stated that the SBC/Sage agreement "contains provisions specific to Sage's business strategies and technology requirements, and that the agreement must therefore be protected from public disclosure for competitive reasons."[24]

Second, if non-251 arrangements of commercial agreements were subject to filing under section 252 for state review, state commissions might insist that the parties change the terms of the agreements as a precondition to their approval. Indeed, the Michigan PSC Order appears to reserve the right to do just that. If carriers cannot be confident that the tradeoffs made in negotiations will be preserved, they are far less likely to enter into such negotiations in the first place. It is precisely because of this risk that one analyst warned that some states could end up "destroy[ing] deals that all parties involved believe are advantageous."[25] This risk is accentuated by the fact that private commercial agreements such as the SBC/Sage agreement are region-wide agreements, not state-specific agreements. As such, they are based on a balancing of interests across several states. Rejection of an agreement or a specific term by just one state thus upsets the calculus upon which the entire agreement is based. This was one of the primary reasons that the previously mentioned analyst recently described as a "train wreck" the prospect of subjecting non-251 arrangements to section 252. Specifically, the analyst noted that "a Region-wide agreement such as the SBC-Sage deal could be disrupted if at least one state disapproves of the terms for its own state," and that "an agreement that might make economic sense at a price averaged across thirteen states might make no sense if a major state ruled that the price has to be changed for its state."[26]

---

[24] TRDaily, Apr. 15, 2004.

[25] *Train Wreck* at 4.

[26] *Id* at 2; *see also id.* at 4 (discussing possibility "that a single state's demand for revision will disrupt the entire multi-state contract.")

Even if an agreement ultimately was approved intact by all respective state commissions, contentious proceedings could well precede any such approval, thereby undermining two of the main benefits of a commercial deal: the elimination of regulatory uncertainty and of regulatory costs. Certainly after eight years of contentious litigation and three remands, many ILECs and CLECs have a compelling need for business certainty and to direct their resources to running their businesses, not to fighting regulatory battles. To deny them the ability to address those needs through commercial negotiations is to withhold one of the most important benefits of – and therefore inducements to - a commercial deal. If the Commission truly wants negotiations to succeed, it must allow parties to reap the fruits of a negotiation.

A requirement that non-251 arrangements be filed with state commissions also raises the concern that, under section 252(i), other CLECs could "pick-and-choose" parts of an agreement, even though those parts do not implement any section 251 obligations. That is a risk that would chill incentives to negotiate by both ILECs and CLECs. The negotiation process involves a series of "gives" and "takes" between negotiating parties. As in any commercial negotiation, this give and take process—and in particular the balance struck by the parties between the "gives" and the "takes"—is critical to voluntary negotiations. No incumbent will offer a "give" if that "give" can be de-coupled from the "take" during a subsequent negotiation. Conversely, no CLEC will make a concession in exchange for a term that it deems favorable, if another CLEC – its competitor - can obtain that same favorable term without the concession. Thus, the application of "pick and choose" to non-251 arrangements would effectively kill the give and take that is so essential to the negotiation of voluntary, commercially viable wholesale arrangements.

Because the decision of the Michigan PSC and the prospect of other, similar decisions threaten to stifle future commercial negotiations, the Commission should resolve this matter immediately. The Commission has previously recognized, in another context, the need for

expeditious action "so as not to impede unduly the development of potentially procompetitive new business arrangements."[27] The Commission also has directed SBC, Sage, and other ILECs and CLECs to use "all means at their disposal"[28] to successfully conclude commercial negotiations. That directive will remain unfulfilled as long as the threat remains that such agreements will be subject to section 252. The Commission should act promptly to remove that threat.

Finally, in addition to declaring that non-251 arrangements are not subject to section 252, the Commission should ensure that these arrangements are not subjected to unnecessary and counterproductive regulatory oversight through some other means. Specifically, to ensure that the market-based objectives of the Act and the Commission are not compromised, and that commercial negotiations can proceed unfettered by the prospect of intrusive regulation, the Commission should preempt states from requiring the filing of non-251 arrangements under state law for their review and approval. A filing and review requirement under the auspices of state law is no less a barrier to commercial negotiations than is an inappropriate application of section 252(a). Both risk disclosure of sensitive business information, and both risk denying the parties the full benefit of their bargain.[29]

It is well-established that state regulation is preempted if it thwarts federal objectives.[30] That is the case even if the federal objective is reflected in a Commission decision to refrain

---

[27] In the Matter of AT&T Corp., et. al., v. Ameritech Corp., File No. E-98-41, *Memorandum Opinion and Order*, 13 FCC Rcd. 14,508 (1998) ("Ameritech Teaming Agreement Standstill Order").

[28] March 31 Letter

[29] This is not a merely theoretical concern. Although SBC does not necessarily agree that such state provisions are applicable, the Michigan PSC Order relies not only on section 252, but also various provisions of Michigan state law, *see* Michigan PSC Order at 2, 4, and the *Texas CLEC Motion* requesting that the Texas Public Utility Commission order SBC and Sage to file their agreement similarly is based in part on Texas law.

[30] *Computer and Communications Industry Assoc v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) ("when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme").

from regulation. Any such decision has as much preemptive force as a decision to regulate. As the Supreme Court has explained, when a federal agency "consciously has chosen not to mandate" particular action, that choice preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]."[31] That is precisely the case here, and for that very reason, the Commission should be clear that it is preempting any conflicting state requirement.

II. THE COMMISSION SHOULD IMMEDIATELY ISSUE A STANDSTILL ORDER ENJOINING THE ENFORCMENT OF ANY STATE FILING REQUIREMENT WHILE THE COMMISSION CONSIDERS THIS PETITION

Even if the Commission considers and grants this petition on an emergency basis, it is not likely to do so in time to prevent the disruption to the status quo threatened by state directives to file the SBC/Sage agreement for their review. The Commission should, therefore, issue a standstill order. The Michigan PSC Order directed SBC and Sage to file their non-251 arrangements by May 5, 2004. And, as discussed above, on April 21, 2004, the General Counsel for the California Public Utilities Commission requested that SBC file with the California Public Utilities Commission a copy of SBC's agreement with Sage.[32] More recently, on April 28, 2004, the staff of the Kansas Corporation Commission requested that SBC justify not filing a copy of its non-251 arrangements with Sage, "so that Staff can determine appropriate action."[33] And last Thursday, a group of CLECs filed a motion requesting that the Texas PUC order Sage and SBC to file their agreement for review and approval.[34] Finally, given NARUC's "reminder" that SBC

---

[31] *Fidelity Fed'l Sav & Loan Ass'n v De la Cuesta*, 458 U.S. 141, 155 (1982); *see also Bethlehem Steel Co. v New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (agency decision not to regulate has preemptive effect when it "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute").

[32] *See* Attachment B

[33] *See* Attachment C

[34] *See TX CLEC Motion.*

and Sage must file their non-251 arrangements,[35] other states may well jump on the bandwagon on this issue. Accordingly, in order to preserve the status quo during the pendency of this proceeding, the Commission should issue a standstill order enjoining enforcement of any state requirement that SBC and Sage file their non-251 arrangements (or any other non-251 arrangements that SBC successfully negotiates with CLECs).

The Commission clearly has authority to issue, and has issued, such standstill orders.[36] Generally, the Commission considers "the four criteria set forth in *Virginia Petroleum Jobbers* to evaluate requests for preliminary injunctive relief: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that the issuance of the order will further the public interest."[37] As with the general standard in civil cases, "no single factor is necessarily dispositive" for the Commission to issue injunctive relief.[38] In this instance, consideration of all the factors warrants the issuance of preliminary injunctive relief.

First, as discussed in detail above, the Michigan PSC Order cannot be squared with the language of the Act or its fundamental goals. Accordingly, there is a substantial likelihood that this petition will succeed on the merits. The only interpretation of section 252(a)(1)'s filing requirements that is faithful to the limitations set forth in section 251, and accords full meaning to the other provisions of sections 251 and 252, is that agreements for products and services required under sections 251(b) and (c) are the only agreements that must be filed with state commissions. In other words, section 252(a)(1) does not require the filing of non-251 arrangements. Because the Michigan PSC Order (as well as any similar prospective state commission decisions) cannot be squared with the language of the Act, there are "serious

---

[35] *See* Attachment D.

[36] *See Ameritech Teaming Agreement Standstill Order*; *AT&T Corp., et al., v. Ameritech Corp.*, 1998 WL 325242 (N.D. Ill., June 10, 1998).

[37] *Ameritech Teaming Agreement Standstill Order* ¶ 14.

[38] *Id*

questions" going to the merits of this issue, which have not "previously been decided,"[39] and the Commission should issue a standstill order.

The disruption to the status quo, and the threat of irreparable harm caused by that disruption if the Commission does not issue a standstill order, also justifies preliminary injunctive relief. If SBC and Sage are required to submit their agreement to the Michigan PSC or any other state commission, there is no practical way to "unscramble" the effects of such a requirement "and return to the current status quo."[40] First, there is no practical way to eliminate the risk of disclosure of competitively sensitive information once that information is no longer in the sole control of the parties, *i.e.*, once it is submitted to a regulatory body. The potential harm presented by the risk of disclosure is substantial: there is perhaps no more confidential information than a company's prospective business plans and strategies.

In addition to the risk of revealing business proprietary information, there is no practical way to reverse the potential costs of having to submit to improper regulatory review. Just as a "standstill order is warranted where the circumstances are such that it would be impracticable to withdraw [] service, once established, because of its disruptive effect,"[41] so too is a standstill order warranted where eventual withdrawal from regulatory review cannot eliminate the costs resulting from such a review.

More fundamentally, there is no practical way to reverse the chilling effect on commercial negotiations and thus the harm to the public interest if a standstill order is not granted. As discussed above, a requirement that non-251 arrangements must be submitted to state commissions will thwart commercial negotiations. As the Commission itself has declared, however, negotiated agreements are critical to preserving "competition in the

[39] *Id* ¶ 21.

[40] *Id.* ¶ 24.

[41] *Id.* ¶ 25.

telecommunications market." [42] And the Commission has further decreed that commercial agreements are "in the best interests of consumers."[43] Clearly, the public interest is not served by action or inaction that has a deleterious effect on both consumers and competition. Even if the Commission eventually annuls the Michigan PSC Order, the damage will have been done if SBC and Sage are forced to file their agreement. Each day that commercial negotiations are foreclosed is another day of consumer and public benefits lost. There can be doubt, therefore, that issuance of a standstill order will substantially benefit the public interest.

Finally, no third parties will be injured by a standstill order. Section 252 contains no deadlines for the filing of negotiated agreements, and, by its own terms, the agreement between SBC and Sage has not yet become effective. Thus, if the Commission ultimately determines in this proceeding that non-251 arrangements must be filed, state commissions will still have sufficient opportunity to fulfill their duties consistent with the requirements of section 252. On balance, therefore, the public interest weighs heavily in favor of a standstill order while the Commission decides the significant issues as to the filing requirements of non-251 arrangements.

[42] March 31 Letter.

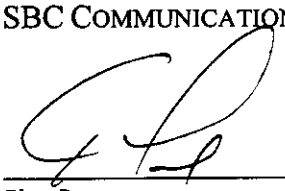
[43] *Id*

CONCLUSION

The Commission has directed SBC and other ILECs to negotiate agreements with CLECs for commercially acceptable substitutes for unbundled elements. In order to remove disincentives to such negotiations, the Commission should immediately clarify that the terms of non-251 arrangements are not subject to section 252. In addition, to ensure that the commercial negotiation process has a chance to succeed, the Commission should preempt any contrary or conflicting state requirement. Finally, the Commission should address this petition on an emergency basis and should immediately issue a stand-still order enjoining the enforcement of any filing requirement while this petition is pending.

Respectfully Submitted,

SBC COMMUNICATIONS INC.



Jim Lamoureux
Gary L. Phillips
Paul K. Mancini
1401 I Street NW 4th Floor
Washington, D.C. 20005
202-326-8895 – phone
202-408-8745 - facsimile

Its Attorneys

May 3, 2004

ATTACHMENT A

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to require **SBC COMMUNICATIONS, INC.**, and **SAGE TELECOM, INC.**, to submit their recently negotiated agreement for the provision of telecommunications services in Michigan for review and approval.	)	Case No. U-14121

At the April 28, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER

On April 3, 2004, SBC Communications, Inc. (SBC), the corporate parent of SBC Michigan, issued a press release indicating that SBC had entered into a seven-year agreement with Sage Telecom, Inc. (Sage), concerning SBC's provision of telecommunications services to Sage in Michigan and several other states.

Pursuant to Section USC 252(a) and (e) of the federal Telecommunications Act of 1996 (FTA), 47 USC 252(a) and (e), interconnection agreements arrived at through negotiations must be filed with and approved by this Commission. Section 252(a) provides that an interconnection agreement "shall be submitted to the State commission under subsection (e) of this section." Moreover, Section 252(e)(1) provides that an interconnection agreement "adopted by negotiation. .shall be submitted for approval to the State commission." More specifically,

Section 252 of the FTA requires that any interconnection agreement that is adopted by negotiation be submitted to this Commission for review as follows:

> (2) The State commission may only reject
>
> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; . . .
>
> (3) Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

47 USC 252(e)(2) and (3).

The Commission's authority to exercise its jurisdiction over the SBC/Sage agreement at issue is not limited to the FTA. Section 355 of the Michigan Telecommunication Act, 1991 PA 179, as amended, MCL 484.2101 et seq. (MTA), clearly obligates a provider of basic local exchange service such as SBC to unbundle and separately price each basic local exchange service offered by the provider into loop and port components. Section 355 also obligates the provider to "allow other providers to purchase such services on a nondiscriminatory basis." MCL 484.2355. Section 357 of the MTA, MCL 484.2357, governs regulation of resale and wholesale rates, terms, and conditions of basic local exchange services. Further, the Commission is empowered to enforce Section 359 of the MTA, MCL 484.2359, which requires that a compensation agreement for the termination of local traffic agreed to by providers must be available to other providers "with the same terms and conditions on a nondiscriminatory basis." MCL 484.2359.

In order for the Commission to perform these statutory duties, the SBC/Sage agreement must be formally filed with the Commission for its consideration.[1] Accordingly, SBC and Sage are ordered to file their recently negotiated agreement in its entirety with the Commission for review.[2] A review of the agreement by the Commission will enable it to determine whether the agreement discriminates against other competitors and is in the public interest. Because of the short timeframe in which carriers are negotiating new arrangements with SBC in light of the recent order issued by the United States Circuit Court of Appeals for the District of Columbia Circuit,[3] the full agreement should be filed no later than 5:00 p.m. on May 5, 2004.

To the extent that SBC and Sage believe that a provision of the interconnection agreement contains commercially sensitive information that should remain confidential, they should identify each such specific provision and shall initially file them pursuant to Section 210 of the MTA, MCL 484.2210, under seal.

The Commission has selected this case for participation in its Electronic Filings Program. The Commission recognizes that some residential customers may not have the computer equipment or access to the Internet necessary to submit documents electronically. Therefore, residential customers may submit documents in the traditional paper format and mail them to the: Executive

---

[1] The Federal Communication Commission recently noted in a declaratory ruling involving QWEST Communications Corporation's failure to seek state review of interconnection agreements that without such review, the non-discriminatory pro-competitive purpose of Section 252 of the FTA would be defeated. See, Quest Communications Corporations Petition for Declaratory Ruling, 17 FCC Rcd 19337 (2002).

[2] The Commission intends this order to require disclosure of any and all agreements between SBC and Sage (including their affiliates) that have not been publicly filed with this Commission and that address, in whole or in part, terms, conditions, or pricing in Michigan for resale, interconnection, unbundled network elements, or port or loop components of SBC's network.

[3] See, United States Telecom Ass'n v FCC, Nos. 00-1012 (consol.), 2004 WL 374262 (CADC March 2, 2004).

Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909. Otherwise, all documents filed in this case must be submitted in both paper and electronic versions. An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at: http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf. The application for account and letter of assurance are located at http://efile.mpsc.cis.state.mi.us/efile/help. You may contact Commission staff at 517.241.6170 or by e-mail at mpscefilecases@michigan.gov with questions and to obtain access privileges prior to filing.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. SBC and Sage should be ordered to file their recently negotiated agreement regarding the provisions of telecommunications services in Michigan with the Commission by 5:00 p.m. on May 5, 2004. SBC and Sage should also be ordered to file and disclose the full content of any understandings, oral agreements, or side agreements that may have a bearing on the agreement.

c. SBC and Sage should identify and file under seal any specific provisions of their agreement for the provision of telecommunications services in Michigan that might contain commercially sensitive information that should remain confidential.

THEREFORE, IT IS ORDERED that:

A. SBC Communications, Inc., and Sage Telecom, Inc., shall file their recently negotiated agreement for the provision of telecommunications services in Michigan by 5:00 p.m. on May 5, 2004. The filing shall also disclose the full content of any understandings, oral agreements, or side agreements that have a bearing on the agreement.

B. SBC Communications, Inc., and Sage Telecom, Inc., shall identify and file under seal any and all specific provisions of the agreement for the provision of telecommunications services in Michigan that may contain commercially sensitive information that they believe should remain confidential.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of April 28, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

THEREFORE, IT IS ORDERED that:

A. SBC Communications, Inc., and Sage Telecom, Inc., shall file their recently negotiated agreement for the provision of telecommunications services in Michigan by 5:00 p.m. on May 5, 2004. The filing shall also disclose the full content of any understandings, oral agreements, or side agreements that have a bearing on the agreement.

B. SBC Communications, Inc., and Sage Telecom, Inc., shall identify and file under seal any and all specific provisions of the agreement for the provision of telecommunications services in Michigan that may contain commercially sensitive information that they believe should remain confidential.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Chair

_____

Commissioner

_____

Commissioner

By its action of April 28, 2004.

_____

Its Executive Secretary

In the matter, on the Commission's own motion, to require **SBC COMMUNICATIONS, INC.**, and **SAGE TELECOM, INC.**, to submit their recently negotiated agreement for the provision of telecommunications services in Michigan for review and approval	)	Case No. U-14121

Suggested Minute:

"Adopt and issue order dated April 28, 2004 requiring SBC Communications, Inc., and Sage Telecom, Inc., to submit their recently negotiated agreement for the provision of telecommunications services in Michigan for review and approval by 5:00 p.m on May 5, 2004, as set forth in the order."